Editor's note: 79 I.D. 431A

MERITT N. BARTON

IBLA 70-423 Decided July 7, 1972

Appeal from decision (W-4336) of Wyoming land office, Bureau of Land Management, rejecting mineral patent application and declaring mining claims null and void ab initio.

Set aside and remanded.

Hearings -- Mineral Lands: Determination of Character of -- Mining Claims: Determination of Validity -- Mining Claims: Hearings -- Multiple Mineral Development Act: Hearings

Where there were no outstanding permits, leases or applications for leases for minerals subject to the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 181 et seq. (1970), when mining claims were located in 1945 and 1952, but the Geological Survey in 1968 has reported that the lands were known to be valuable for leasable minerals subject to that Act since 1920, a mining claimant is entitled to a hearing on the question of the known mineral character of the land at the time his claims were located before the claims can be declared void ab initio for his failure to file amended locations as required to take advantage

of the benefits of section 1 of the Multiple Mineral Development Act of August 13, 1954, 30 U.S.C. § 521 (1970).

Mining Claims: Determination of Validity -- Mining Claims: Patent

Section 2332, Rev. Stat., 30 U.S.C. § 38 (1970), does not obviate the necessity of a mining claimant to show a valid discovery in order to be entitled to a patent for a mining claim.

Mining Claims: Determination of Validity -- Mining Claims: Lands Subject to -- Mining Claims: Relocation -- Multiple Mineral Development Act: Generally

Section 2332, Rev. Stat., 30 U.S.C. § 38 (1970), may not create any rights to a mining claim against the United States where the land is not open to entry under the mining laws. If, however, the land becomes open for entry under the mining laws, and in the absence of any intervening rights, that provision may serve as a substitute to making a new location if the lands are held for the requisite number of years thereafter and a discovery of a valuable mineral deposit is then shown. This includes lands opened to mining claims under the Multiple Mineral Development Act, but under that Act the leasable minerals would be reserved to the United States.

APPEARANCES: Otis Reynolds, Reynolds and Hughes, attorney for Meritt N. Barton.

OPINION BY MRS. THOMPSON

Meritt N. Barton has appealed to the Director, Bureau of Land Management, 1/ from a decision by the Bureau's Wyoming land office dated November 24, 1969, rejecting his application for mineral patent for nine placer mining claims 2/ embracing portions of secs. 22, 27, and 34, T. 49 N., R. 66 W., 6th P.M., Crook County, Wyoming, and declaring such claims null and void ab initio. The land office decision was based solely on the ground that the claims, which were located in 1945 and 1952 for bentonite 3/, are situated on lands

1/ The Secretary of the Interior, in the exercise of his supervisory authority, transferred jurisdiction over all appeals pending before the Director, Bureau of Land Management, to the Board of Land Appeals, effective July 1, 1970. Cir. 2273, 35 F.R. 10009, 10012.

2/ Meritt N. Barton has been the owner of record of the claims since 1960, but states that he holds the title to fractional interests therein in trust for the following persons: Caroline Barton; Nelda Barton; Verne F. Barton; Verne F. Barton, Jr.; Billie Lee Barton; Elaine Barton; Otis Reynolds; Mary Lou Barton; George L. Barton; Jessie M. Barton; Merle Nefsy; Bronna L. Rohde, formerly Bronna L. Nefsy; Claire C. McGuckin; James T. McGuckin, Jr.; Imogene C. Thomas; and Marjorie May Bertagnolli. Appellant owns a fractional interest in all of the claims except one, the Billie No. 2.

Although the other persons listed above were named as contestees in previous proceedings relating to these claims, the land office decision of November 24, 1969, named only Meritt N. Barton, and the current appeal is prosecuted solely in his name,

3/ The claims in question are the Black Draw Nos. 1 and 2, and Barton Nos. 1 and 2, located July 20, 1945; the Billie Nos. 1, 2, and 3, located May 15, 1952; and the Nefsy Nos. 1 and 2, located July 18, 1945.

which were known to be valuable for oil and gas at the times of location, and that the record showed that appellant had failed to comply with the provisions of the Act of August 12, 1953, 30 U.S.C. § 501 (1970), and the Multiple Mineral Development Act of August 13, 1954, 30 U.S.C. § 521 (1970).

The statutes referred to require that, in order to have validated any mining claim located subsequent to July 31, 1939, and prior to January 1, 1953, covering lands which at the time of location were included in a permit or lease, or an application for a permit or lease, for leasing act minerals, or which were known to be valuable for such minerals, the owner of the claim must have filed not later than 120 days subsequent to August 12, 1953, an amended notice of location, which notice must have specified that it was filed pursuant to the Act of August 12, 1953, and for the purpose of obtaining the benefits set forth in that Act 4/.

4/ In determinations construing the Mineral Leasing Act of February 25, 1920, 30 U.S.C. § 181 et seq. (1970), the Department held that that Act had segregated from appropriation under the mining laws lands which were included in a permit or lease, or application for permit or lease, for leasable minerals, or were known to be valuable for such minerals. Any purported locations on such lands made after the effective date of the Act were regarded as void ab initio, since a tract of public land could not simultaneously be subject to both a permit or lease and a valid mining claim, and the mining laws contained no authority for issuance of patent with a reservation of leasable minerals. See Arthur L. Rankin, 73 I.D. 305, 309 (1966); United States v. U.S. Borax Co., 58 I.D. 426, 432 (1943); Secretary's Letter, 50 L.D. 650 (1924); Joseph E. McClory et al., 50 L.D. 623 (1924).

The purpose of the Act of August 12, 1953, and Multiple Mineral Development Act of August 13, 1954, was to provide for the concurrent

The validity of the claims in question has been the subject of protracted litigation. Appellant filed his first application for patent on February 2, 1960. On October 22, 1962, the Bureau of Land Management instituted a contest against the claims, alleging in substance that the lands included therein were nonmineral in character, and that no discovery of a valuable mineral deposit had been made. Appellant answered, denying the charges. A supplemental complaint issued March 13, 1963. Subsequent to issuance of the complaint, the land office ascertained that oil and gas leases had been issued for portions of the lands comprising the claims after the claims had been located, and by a decision of August 27, 1963, directed the claimant to file a private contest against the lease holders, pursuant to section 7 of the Multiple Mineral Development Act, 30 U.S.C. § 527 (1970). Appellant complied with the Bureau's directive. Upon the failure of any of the lessees to file an answer to the complaint, the mining claimant's rights were affirmed and the private contest was dismissed by the land office in a decision dated July 21, 1965.

(fn. 4 cont.)
exploitation of all mineral resources, both patentable and leasable, in the public lands. To this end, the Acts prescribed a procedure for validation of existing mining claims located subsequent to July 31, 1939, and prior to February 10, 1954, which were previously considered invalid because of conflict with the Mineral Leasing Act. The 1954 Act also authorizes the location of future claims on lands covered by a mineral permit or lease, or application therefor, or which are known to be valuable for leasable minerals. A patent for such claims must contain a reservation of leasable minerals to the United States. 30 U.S.C. §§ 502, 524 (1970).

On January 3, 1966, Barton withdrew his initial application for patent, reserving the right to reapply, and the land office, in a decision dated January 11, 1966, accepted the withdrawal and dismissed the Government's contest without a hearing and without prejudice

Appellant filed a second application for patent of the claims, January 30, 1967, supplemented on February 20, 1967. On March 10, 1967, the Bureau issued a new contest complaint, alleging that "[n]o discovery of a valuable mineral sufficient to support a mining location has been made upon or within the limits of said claims." At a hearing on the contest held on June 25, 1968, the hearing examiner declined to allow the Government to elicit testimony from appellant as to the dates when any purported discovery on the claims had been made. The Government then moved to amend the complaint to allege that if a discovery had been made it was made subsequent to August 13, 1954, the date of enactment of the Multiple Mineral Development Act. The hearing examiner denied the motion to amend, and in a decision dated August 13, 1968, dismissed the contest with prejudice.

Upon appeal by the Government, the Office of Appeals and Hearings, Bureau of Land Management, by decision of August 6, 1969, reversed the hearing examiner's decision and remanded the case to the Bureau's State Director for Wyoming "for the amendment of the

complaint or the filing of a new complaint with charges appropriate to raise the issues intended * * *." The decision pointed out that, contrary to the finding of the hearing examiner, the date of discovery on the claims was an important factor in any determination of their validity. Instead of proceeding with the contest, the Wyoming land office declared the claims null and void ab initio.

In concluding that the lands were known to be valuable for minerals leasable under the Mineral Leasing Act at the time the claims were located, the land office indicated that although there were no permits or leases or applications or offers therefor at that time, at various times prior and subsequent to the location of the claims, portions of all of the lands within the mining claims were included in permits or leases or applications or offers for such permits or leases under the Mineral Leasing Act. It stated that the lands have been classified as known to be valuable for minerals subject to the mineral leasing laws as follows:

> Upon further consideration of previous classifications, the Director of the United States Geological Survey, on October 25, 1968, determined on the basis of published evidence that the subject lands were known to be valuable for oil and gas and oil impregnated rocks as early as 1920 and that the lands involved in the subject application were known to be valuable for oil and gas and asphalitic minerals, but not other leasing act minerals, on January 1, 1945, and from that time to the present during which time location of the captioned mining claims was attempted. Further, the Director of the United States Geological Survey stated that, "Subsequent oil and gas developments on these and adjacent lands to date confirm the determination that these lands are known to be valuable for oil

> and gas, notwithstanding the presence of shallow dry holes drilled in the S 1/2 of Section 34, T. 49 N., R. 66 W."

Appellant does not assert that amended locations of the claims were filed in accordance with the Acts of August 12, 1953, and August 13, 1954. Instead, he contends that the record fails to show that the claims come within the purview of those Acts so as to necessitate such filings. Appellant cites the history of these claims and contends basically that the case should be sent back for a hearing as provided in the Bureau's decision of August 6, 1969.

We agree that there must be a hearing in this matter.

The situation here is different from other cases where claims may appropriately be declared null and void ab initio without a hearing because the records of this Department conclusively show that land is not subject to appropriation under the mining laws, such as where the land has been classified under the Recreation and Public Purposes Act, 43 U.S.C. § 869 (1970), Buch v. Morton, 449 F.2d 600 (9th Cir. 1971); or the Small Tract Act, 43 U.S.C. § 682a (1970), Dredge Corporation v. Penny, 362 F.2d 889 (9th Cir. 1966); or is otherwise withdrawn from mineral entry. Wesley Laubscher, 4 IBLA 246 (January 12, 1972). If the facts upon which the determination of invalidity is based are not apparent on the face of the record

and are subject to dispute, mining claims cannot be declared invalid without a hearing to resolve the factual issues. Id.; Mr. and Mrs. Ted R. Wagner, 69 I.D. 186 (1962); John D. Archer, Stephen D. Smoot, 67 I.D. 181 (1960).

The determination by the Geological Survey that the land was known to be valuable for oil and gas was not made until October 25, 1968, and, indeed, was a change from prior communications from that office to the Bureau on that matter. At the time the claims were located there were no permits or leases for oil and gas or applications therefor which would have been ascertainable from the status records of the land office. 5/ Also, there is no indication that the land was then within any petroleum reserve area or had otherwise been classified as valuable for oil and gas or withdrawn for such minerals in a manner which would have been reflected on the land office status records. Even where lands have been formally classified or withdrawn for minerals subject to the Mineral Leasing Act and this is reflected on land office status records, mineral locators have been permitted a hearing to dispute such a classification, or determination of the known character of the land. Solicitor's Opinion, 63 I.D. 346 (1956). A hearing, therefore, is required

5/ Where there were such permits or leases or applications and no showing of compliance with the Act of August 12, 1953, or the Multiple Mineral Development Act of 1954, mining claims would then be invalid and no hearing would be necessary. Clear Gravel Enterprises, Inc., 64 I.D. 210 (1957). But see the discussion, infra concerning a holding of the claim for the state's statute of limitations after the Multiple Mineral Development Act.

here to determine if the land was known to be valuable for minerals subject to the mineral leasing laws when the claims were located to determine the necessity for appellant's compliance with the Acts cited above, and other consequences indicated in the Bureau's Office of Appeals and Hearings' decision of August 6, 1969, and below.

We believe that the appropriate procedure in this instance is the issuance of a new contest complaint. In the interest of disposing of this long-standing case finally, when this case is returned to the Bureau for issuance of a new complaint, all matters going to the validity of the mining claims should be considered. At a hearing, evidence relating to all the disputed facts, including the known value of the land for Mineral Leasing Act minerals, should be presented. Cf. Long Beach Salt Company, 6 IBLA 50 (May 17, 1972).

There is one issue raised by appellant which needs clarification now. Appellant contends that in the event of a further hearing, evidence would be presented that he and his predecessors have held the claims for a period equal to the time prescribed by the statute of limitations for mining claims prescribed by the State of Wyoming. Therefore, he asserts, he is entitled to a patent pursuant to 30 U.S.C. § 38 (1970). This provision codifies Rev. Stat. § 2332, and provides that where any persons have held and worked their claims for a period equal to the time prescribed by the statute of limitations

for mining claims of the state or territory in which they are situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under the mining laws of the United States. In Cole et al. v. Ralph, 252 U.S. 286, 307 (1920), the Supreme Court held that this section did not obviate the necessity for a mining claimant to make a discovery of a valuable mineral deposit in order to be entitled to a patent from the United States. Its purpose was only to obviate the need for proof of the posting, etc. of a location notice. Therefore, even if the claimant shows compliance with this section, there must still be a demonstration that there is a valid discovery on each claim within the meaning of the mining laws to warrant issuance of a patent. See also, Fresh v. Udall, 228 F. Supp. 738, 743 (D. Colo. 1964); Harry A. Schultz et al., 61 I.D. 259, 263 (1953); Susie E. Cochran, et al. v. Effie V. Bonebrake, et al., 57 I.D. 105 (1940).

The status of the land is important in applying Rev. Stat. § 2332. It is clear that if land is not open to entry under the mining laws, no rights in a mining claim may be created against the United States by Rev. Stat. § 2332 as that provision necessarily assumes that lands are open to mineral entry and patent. Chanslor-Canfield Midway Oil Co. et al. v. United States, 266 F. 145, 151 (9th Cir. 1920); United States v. Midway Northern Oil Co., et al.,

232 F. 619 (S.D. Cal. 1916). Thus, a location deficient because made when the lands were not open to mineral location cannot be cured, even though there was a discovery, so long as the land is not subject to mineral location. If the land becomes open to entry under the mining laws, however, Rev. Stat. § 2332 may serve as a substitute for making a new location when the land becomes open, if the lands are held for the requisite number of years thereafter, and there are no intervening rights, assuming of course, that a discovery of a valuable mineral deposit is then shown. Harry A. Schultz, et al., supra.

The Multiple Mineral Development Act has now, in effect, opened to location under the mining laws, lands known to be valuable for leasable minerals, or on which there is a mineral permit or lease or application therefor, subject to a reservation of the leasable minerals to the United States. See n. 4, supra. Therefore, mining claims held for the requisite time after the date of that Act may be validated by Rev. Stat. § 2332, assuming, of course, the claims are otherwise locatable for minerals still subject to the mining laws, and a discovery of a valuable mineral deposit has been made. The leasable minerals would be reserved to the United States, however. This possibility should be considered in the further proceedings in this case.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is set aside and the case is remanded to the Bureau for further action consistent with this decision.

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Joan B. Thompson, Member

We concur:

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Edward W. Stuebing, Member

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Joseph W. Goss, Member